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No. 774

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

ELMO E. ALLEN, ET AL.,
Petitioners,

v.

THE COLUMBIA GAS SYSTEM, INC., ET AL.,
Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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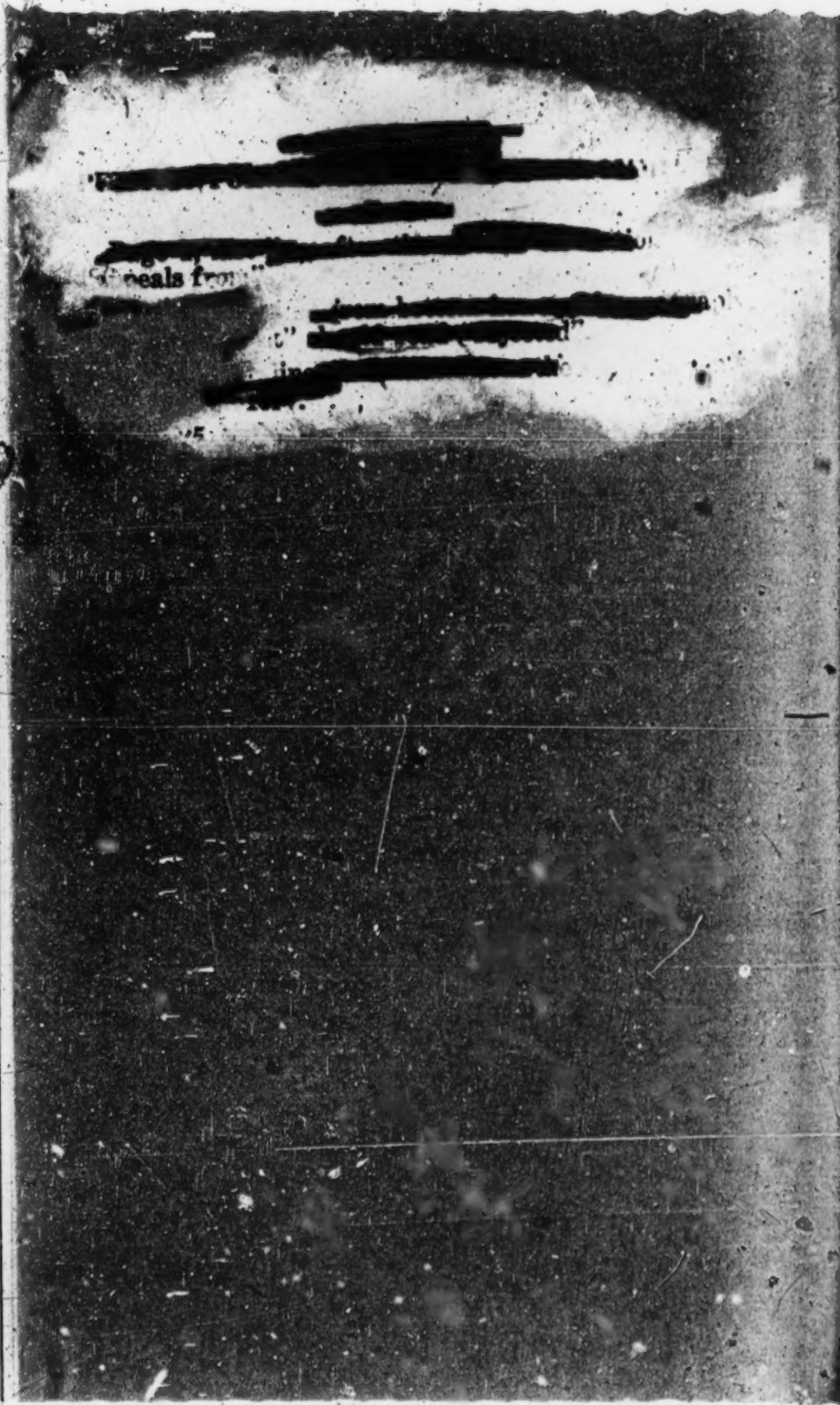
April 16, 1959



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Williamson, Trustee of Inland and Kentucky, and Columbia oppose the Petition for Certiorari of the Allen Committee, No. 774. This reply will consider briefs in opposition filed by these parties.

ARGUMENT

Neither Williamson nor Columbia argue that the Plan confirmed below is fair and equitable. Neither argue that the provisions of the Plan which give to Columbia the assets and business of the debtors follow principles of bankruptcy administration established

by this court. The argument is that because the Court of Appeals in the past has refused to disallow Columbia's claims, this court should not grant review to consider whether the decision of the Court of Appeals confirming the Plan violates essential equities and established principles of bankruptcy administration.

Williamson Brief

Williamson's first argument that public stockholders have no standing to question the decision below because all of the debtors are insolvent deserves little attention. Neither Inland nor American is insolvent by recognized accounting standards.[1] Insolvency is claimed only because American and Kentucky creditors are held to be quasi creditors of Inland. Public stockholders challenge this holding below and have the right to challenge it.

Williamson's statement that the court below has "rejected" the interests of public stockholders of American (on which he bases his next argument) is misleading. The courts below have never rejected public stockholders' interests as having no equity. These interests are now disallowed, as they have been in the past, since they are classified as inferior to claims of creditors which absorb all the assets of the debtors leaving nothing for stockholders.[2]

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[1] This is not denied by Columbia (Br. pp. 11, 12) or by Williamson (Br. pp. 3, 4). SEC recognizes this (Br. p. 28, ft. n. 10).

[2] Columbia's claims have also been disallowed. They were rejected for want of equity in 1941 and were disallowed in 1945, 1951 and 1954 because prior claims exhausted the debtors' assets. These decisions held that public creditor claims were superior to both Columbia's claims and stockholders' interests.

Columbia's Brief

Columbia's principal argument seems to be that the Court of Appeals' refusal "to repudiate its prior decisions" (Columbia's Brief, p. 20) is not an abuse of that court's discretion. But discretion is not involved here.

The Court of Appeals had no discretion to allow claims saturated with fraud, violation of fiduciary duties of majority stockholders to the minority and plain illegality. *Pepper* v. *Litton*, 308 U.S. 295. *Pepper* clearly establishes the power of the court to disallow Columbia's claims. But it does more. It establishes just as clearly that it is the DUTY of the bankruptcy court (not a discretionary power) to disallow such claims.

In *Pepper*, Justice Douglas, writing for the court, points out that a controlling stockholder (Columbia here) is a fiduciary. Its dealings with the corporation are subject to rigorous scrutiny and

> "• • • the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. • • • If it does not, equity WILL set it aside. • • •" (308 U.S. 295, pp. 306, 307).[1]

Both the power and the duty of the bankruptcy court are expressly pointed out.

> "• • • In the exercise of its equitable jurisdiction the bankruptcy court has the power to

[1] All emphasis in quotations supplied.

> sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its DUTY so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and DUTY of the bankruptcy courts under the reorganization sections. * * *" (*Id.*, pp. 307, 308).

Disallowance of claims WILL be ordered where they are fictitious or sham and

> "* * * a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant. * * *" (*Id.*, pp. 310).

* * *

> "* * * Where there is a violation of those principles, equity WILL undo the wrong or intervene to prevent its consummation". (*Id.*, p. 311).

The duty of the court to weigh the equities in a case like this could hardly be made clearer. The retreat by the Court of Appeals behind "determinations previously, and repeatedly, made"[4] in order to avoid consideration of equities squarely conflicts with this court's decision in *Pepper*.

Stockholders' Equity

The equities of the American public stockholders are as clear as is the lack of equity in Columbia's claims. When Inland and Kentucky were in financial difficulties, American stockholders pledged all their stock in

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[4] 241 F. 2d 374, 381.

Inland and Kentucky to secure the American notes in order to obtain nearly $2,000,000.00 to pour into the Inland and Kentucky operations.[5] When default in debts became imminent, stockholders surrendered control of the debtors by issuing 76% of the American stock to the Syndicate in a final effort to save all three debtors and their creditors.[6] Neither American or its stockholders received a dollar in dividends or repayment of loans. In short, the stockholders, under no legal compulsion to do so, first put their entire holdings in the debtors at risk to protect the debtors and their creditors, and finally surrendered three-fourths of their interest to others when this became necessary. Stockholders' equities, so acquired, should be enforced.

Respondents' Plea for Finality

Columbia (Br. p. 6) and Williamson (Br. p. 5) argue that these proceedings have been in court for many years and since at last a plan has been confirmed, this court should not review. This argument was made below and could hardly have failed to appeal to the Sixth Circuit, which already had reviewed several plans of reorganization of the debtors and written at least eight opinions dealing directly with plans. We hesitate to urge that this court should not entertain a presumption that the courts below, thoroughly familiar with these proceedings, would refuse to sanction serious injustice in approving the Plan. We recognize that this court is not primarily a court for the correction

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[5] "The proceeds thereof (American note sale) were used to provide financial aid to the operating companies * * *." (151 F. 2d 461, 463; App. Allen Pet. p. 21).

[6] 151 F. 2d 461, 465; App. Allen Pet. p. 25.

of errors below and that even substantial injustice in the order below may not be sufficient to invoke its power of review. In all deference, however, we submit that this is an exceptional case. Before 1957 equitable considerations were held to bar Columbia. But on the 1957 and 1959 Appeals, utter weariness with this case and understandable dismay at the prospect of considering still another plan of reorganization could have dulled the sharp eye of the Court of Appeals in detecting serious departure from accepted equitable principles in reorganization which are present mainly because of the great increase in Inland's assets during bankruptcy.

CONCLUSION

The Petition for a Writ of Certiorari of the Allen Committee, No. 774, should be granted.

Respctfully submitted,

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